

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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In the Matter of)
)
 Amendment of Section 73.202(b))
 Table of Allotments)
 FM Broadcast Stations)
 (Seymour and Sellersburg, Indiana))

MB Docket No. 03-98
 RM-10688

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

To: Assistant Chief, Audio Division
 Media Bureau

REPLY COMMENTS

S.C.I. Broadcasting, Inc., licensee of Station WQKC(FM), Channel 229B, Seymour, Indiana ("Petitioner"), hereby submits its Reply Comments in the above-captioned proceeding.¹

In support hereof, the Petitioner states as follows:

1. The *NPRM* proposes the substitution of Channel 230A for Channel 229B at Seymour, Indiana, and the reallocation of Channel 230A from Seymour to Sellersburg, Indiana, as the community's first local transmission service and modification of the license for Station WQKC(FM) accordingly. Two parties filed opposing comments, but both commenters failed to comply with required procedures.² Evangel Schools, Inc. ("Evangel"), licensee of FM Translator W230AK, Louisville, Kentucky, filed two days late, with no explanation for its tardiness. Eric Heyob filed a letter comment with no certificate of service. The Commission should strike both comments on procedural grounds. However, even if it allows the comments into the record, it should deny the oppositions, because neither party raises sufficient concerns to overcome the public interest in the proposed reallocation.

¹ See Notice of Proposed Rule Making ("NPRM") in the above-captioned proceeding, DA 03-1122, released May 30, 2003

² Petitioner is not aware of any other comments. If other comments were filed, they were not served on Petitioner and should not be considered by the Commission. See 47 C.F.R. § 1.420(a)

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2. Evangel's Opposition was filed two days late, with a footnote requesting acceptance. *See* Opposition of Evangel at 15 n. 7. The Commission should not accept Evangel's late-filed comments. The Commission's policy is not to accept late filings in contested proceedings (even when accompanied by a motion for acceptance) except in "unusual or compelling circumstances." *Santa Isabel, Puerto Rico and Christiansted, Virgin Islands*, 3 FCC Rcd 2336 (1988), *aff'd sub nom. Amor Family Broadcasting Group v FCC*, 981 F.2d 960 (1990). *See also Pleasanton, Bandera, Hondo and Schertz, Texas*, 15 FCC Rcd 3068 n.2 (2000) (rejecting late-filed comments); *Hazlehurst and Bude, Mississippi*, 10 FCC Rcd 2164 (1995). Evangel has not expressed any such unusual or compelling circumstances here; in fact, it has not given any reason at all for its lateness. Moreover, Evangel did not include a separate motion for the acceptance of the late-filed comments, as required under the Commission's procedural rules and policies. *See Bethel Springs, Tennessee, et al*, 16 FCC Rcd 20329, 20330 (2003), *recon.*, 17 FCC Rcd 14472 (2002); *D&I Electronics, Inc.*, 17 FCC Rcd 24430 at n.31 (2002). Accordingly, the Commission should not accept Evangel's comments.

3. Heyob also failed to follow basic procedural rules. His comments were not accompanied by a certificate of service, and were not properly served on Petitioner. The *NPRM* states that comments must be accompanied by a certificate of service, and must be served on the petitioner. *NPRM*, Appendix, at ¶ 4.; *see also* 47 C.F.R. § 1.420(a). Failure to obey this rule can result in dismissal of the offending comments. *See Mount Pleasant and Bogata, Texas*, 15 FCC Rcd 25565 (2000); *Franklin and White Castle, Louisiana*, 11 FCC Rcd 8662 (1996). Accordingly, Heyob's comments should be rejected as well.

4. Even if the comments are accepted, however, neither raises concerns meriting the denial of the proposal in this proceeding.

5. Evangel raises two arguments in opposition to the relocation of Station WQKC from Seymour to Sellersburg. First, it argues that Sellersburg, Indiana is insufficiently independent of Louisville, Kentucky to be awarded a first local service preference. However, this case simply involves a routine application of the factors set forth in *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1998), which easily demonstrate that Sellersburg is independent from Louisville. Petitioner has already furnished a *Tuck* showing, as the Commission acknowledges. *NPRM* at ¶ 4. In considering the independence of Sellersburg, it is important to recognize that the communities are in different states, separated by the Ohio River, and have developed and prospered as distinct communities. This places a strong presumption on Sellersburg's independence, which Evangel fails to rebut.

6. With regard to the first factor (the extent to which the residents of the community work in the community), Evangel states that "a majority of the Sellersburg workforce are employed outside of Sellersburg." However, this is not the applicable standard. The Commission stated in one case that 16% of working-age residents working in the community is sufficient for a favorable finding on this factor. *Anniston, Alabama, et al.*, 16 FCC Rcd 3411, *aff'd by the Commission*, 16 FCC Rcd 19857 (2001). The Commission has also found in favor of independence when as few as 6% of working-age residents worked in the community. *See Coolidge and Gilbert, Arizona*, 11 FCC Rcd 3610 (1996) (6%); *Albemarle and Indian Trail, North Carolina*, 16 FCC Rcd 13876, 13880 (2001) (11.3%). The latest figures from the Census Bureau confirm that 13.8% of the 3270 employed residents of Sellersburg work in Sellersburg, in keeping with the Commission's other recent decisions on this issue. *See Exhibit A.*

7. With regard to the second factor (newspapers and other media), Evangel confirms that this factor weighs in favor of Sellersburg's independence because it is served by a daily

newspaper, the Evening News, published in nearby Jeffersonville, Indiana. This newspaper is emphatically *not* a Louisville newspaper. It serves the western Clark County, Indiana area where Sellersburg is located, and contains community news and advertising specifically directed towards Sellersburg residents. *See* Exhibit A. Louisville, of course, has its own daily newspaper.

8. Factors three, four, five, and six also weigh in favor of Sellersburg's independence. As amply demonstrated in the Petition, Sellersburg, Indiana developed separately from Louisville, and local residents do not think of themselves as Louisville residents (factor three). Sellersburg is self-governed (factor four). Telephone listings for Sellersburg are found in the Jefferson-Clarksville-Sellersburg telephone directory, which is separate and distinct from the Louisville telephone directory (factor five). Sellersburg businesses are listed in a separate section of this directory. Sellersburg has ample businesses, health care facilities, churches, and civic organizations for a community of its size (factor six).

9. With regard to the seventh factor (advertising market), Petitioner demonstrated that with a daily local newspaper and web site, Sellersburg is not dependent on Louisville media outlets. Because Sellersburg has access to other media outlets, this factor weighs in favor of Sellersburg's independence. *See Bridgeton and Pennsauken, New Jersey*, 18 FCC Rcd 12192 at ¶ 7 n.8 (2003). Evangel merely recites that Sellersburg and Louisville are in the same radio and TV market areas, which could hardly be otherwise given that Sellersburg is without local broadcast service of any kind.

10. With regard to the final factor (municipal services), Evangel notes correctly that Sellersburg residents receive their municipal services partly from Sellersburg and partly from Clark County, Indiana. The point to be gleaned from this is that Louisville does not provide *any*

municipal services to Sellersburg. Accordingly, this factor weighs in favor of Sellersburg's independence from Louisville.

11. Evangel's second argument against the relocation of Station WQKC from Seymour to Sellersburg is that its co-channel translator station, W230AK, would be forced off its frequency by the relocation. This is Evangel's primary interest in the proceeding, and the main reason it is participating at all. However, the Commission recently considered and rejected similar arguments in *Bridgeton and Pennsauken, New Jersey*, 18 FCC Rcd 12192 (2003). The potential interference to translators simply is not considered in allotment proceedings. *Willows and Dunnigan, California*, 15 FCC Rcd 23852, 23856-57 (2000). Consistent with this policy, the Commission's translator rules are based on actual interference, not potential interference. Thus, the Commission's rules do not permit an FM translator to operate if it "causes any actual interference to [t]he direct reception by the public of the off-the-air signals of any authorized broadcast station." Accordingly, any issue with respect to the operation of W230AK will not be ripe unless and until actual interference is caused. *See Kingston, New York*, 17 FCC Rcd 14326 (2002) (interference to secondary services is not a proper consideration at allotment stage). If actual interference is caused, it is the translator that must cease operations. *Bridgeton, supra*.

12. Heyob's comments should be rejected on procedural grounds, as discussed above. Should the Commission allow them into the record, however, they do not detract from the merits of Petitioner's proposal. Heyob accuses Petitioner of lying with respect to operation of a Sellersburg station, which is a serious charge but utterly without factual foundation. Petitioner has already expressed its interest in applying for and constructing a station in Sellersburg, and reiterates that interest here.

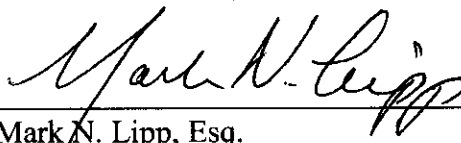
13. Heyob notes WZZB(AM) and WJRL(FM) will remain licensed to Seymour after the relocation of WQKC. Although WZZB is licensed for only secondary operation at night, and WJRL is a noncommercial educational (NCE) station, either one of these stations would prevent Seymour from being deprived of local service, and both together are more than ample to satisfy this criterion. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094, 7097 (1990) (both daytime-only and noncommercial services constitute local aural transmission services for the purposes of applying the FM allotment priorities); *Grants, Milan and Shiprock, New Mexico*, 16 FCC Rcd 20323 (2001); *Ravenswood and Elizabeth, West Virginia*, 10 FCC Rcd 3181 (1995); *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995).

WHEREFORE, for the foregoing reasons, S.C.I. Broadcasting, Inc. urges the Commission to dismiss or deny the oppositions and grant the petition.

Respectfully submitted,

S.C.I. BROADCASTING, INC.

By


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Its Counsel

August 5, 2003

EXHIBIT A

U.S. Census Bureau

American FactFinder

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Workers 16 years and over

Data Set: Census 2000 Summary File 3 (SF 3) - Sample Data

NOTE: Data based on a sample except in P3, P4, H3, and H4. For information on confidentiality protection, sampling error, nonsampling error, and definitions see <http://factfinder.census.gov/home/en/datanotes/expsf3.htm>

	Sellersburg town, Indiana
Total	3,187
Living in a place	3,187
Worked in place of residence	451
Worked outside place of residence	2,736
Not living in a place	0

U.S. Census Bureau
Census 2000

Standard Error/Variance documentation for this dataset:

Accuracy of the Data: Census 2000 Summary File 3 (SF 3) - Sample Data (PDF 141.5KB)

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July 24, 2003

Board to reevaluate zoning ordinance

By JOHN L. GILKEY

Sellersburg's Plan Commission and Board of Zoning Appeals want to take a look at the town's zoning ordinance and the height restriction that now applies to residential structures following a petition for a variance from the 25 foot height restriction heard earlier this week.

The Board of Zoning Appeals heard an appeal from Kevin Staton who is building a two story home in the Adams Creek subdivision and ran into a problem with the building's height because of having nine-foot ceiling heights.

The Board of Zoning Appeals approved the variance, but board president Charlie Ridenour referred the matter to the attention of the Plan Commission to see if the town's building code should be updated.

Plan Commission President Doug Reiter, who also sits on the Board of Zoning Appeals, raised the issue with his board saying, "I have been told that height restriction was put into effect back when the town's fire department didn't have a ladder truck." He said the Sellersburg Volunteer Fire Department now has two such trucks.

The board voted this week to ask the town council to review the building code and ask town attorney Perry McCall to review the code ordinance to reflect the higher allowable height.

Ironically, Reiter said, the town's ordinance on multi-family residential structures allows heights of up to 35 feet in place of the single family residential height limit of 25 feet.

In another matter, Sellersburg Building Commissioner Nathan Grimes ask the consent of the Plan Commission to approach the town council with a contract proposal to update the town's zoning map and incorporate zoning classifications that were grandfathered into existence when areas were annexed into Sellersburg.

Grimes said he feels the work is beyond the scope of his \$25,000 salary as building commissioner and should be done under a separate contract for an additional fee.

The Plan Commission also tabled action on final plat approval for the Adams Creek Subdivision after neighbors raised concerns about drainage issues for the development.

Grimes, the town's building commissioner is also a licensed engineer, and has been employed by the developers to design the subdivision which put the town official in the unusual position of reviewing, and on occasion explaining, his design plans for the subdivision being developed by Kevin Stayton.

Residents said a grass-lined drainage swail did not appear to have the capacity to carry off all of the water that would be generated by the development, and asked the Plan Commission to look into the matter further. The Commission can only draw upon the expertise of Grimes, whose design was called into question.

In the end, the commission voted to table the matter, and asked Grimes to bring them additional information to support his finding that the drainage would be sufficient to handle the storm water that would be generated.

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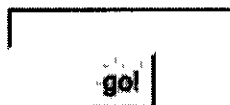
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July 22, 2003

Stop work order lifted, work to continue in Sellersburg

By JOHN L. GILKEY

A stop work order was lifted last evening by the Sellersburg Plan Commission allowing Jim O'Neal Ford and contractor Clark Nickles to resume hauling dirt from the site of a major construction project being undertaken by the West Clark School Corp., but not before assurances that discourteous drivers, speeding trucks and dust clouds would be dealt with.

The dirt is being dumped on land owned by the auto dealership, raising it to a level where it could be developed at a later time while allowing the school corporation to get rid of a massive mound of earth that must be removed at the site of the Sellersburg Elementary School to make room for a new parking lot.

Nickles had been hauling materials to O'Neal's site for approximately 10 days before a stop work order was issued by the town's building commissioner amid complaints from neighbors.

O'Neal appeared at last evening's Plan Commission meeting with attorney Bob Lanum asking to be allowed to resume work on the project. "He can have the project completed in five to six days," the attorney told the commission.

Work was stopped to clarify what materials were being hauled to the site, and to ensure that all necessary permits were in order, town officials said.

But residents had a different agenda. They said Nickles was hauling more than 100 dump trucks a day to the site and creating clouds of dust that were choking residents and creating conditions that prevented homeowners from enjoying their property.

The most serious complaints, however, were about truck drivers who were speeding along the narrow road that leads to the dumping site, and about drivers who would urinate alongside their trucks, blow their horns to aggravate people who complained and generally intimidate neighbors.

Jeff Tweedy told the commission, "They're bringing trucks in across from my house and leaving dirt, and one big mess." He said the operation was also creating excessive noise.

Joe Davenport told the commission, "I live 30 feet from the entrance they are using and the dust is so bad it's inside my home.

"I'm changing filters every three days and I still have dust coming out my vents."

Don Parsley said the contractor is not only dumping dirt, but "plastic pipe, conduit and wire." He said one piece of pipe appears to be a sewer pipe with raw sewage inside that created a stench in the area.

Terry Johnson, who lives near the area concurred: "I can't even see their houses some times." He said he also smelled the odors from the dumped materials.

Owner Chris O'Neal agreed with the residents that there had been some problems with drivers and said he has contacted the police department and asked that there be patrols in the area to ensure there is no speeding.

"They gave us the number of one truck that was causing a problem and we got rid of him right away," O'Neal said. He told the commission the truck in question was operated by a subcontractor who was removed from the project.

"There's going to be dust - there's no way of getting away from that," O'Neal told the commission." But he went on to say, "With good weather, we can have the project completed in five to six days.

O'Neal agreed to clean the cars of people living in the area who have complained, but told Davenport and others that he would not assume any responsibility for cleaning the inside of homes.

In the end, the commission agreed to allow dumping to continue behind the auto dealership but said police will monitor the area to ensure that there is no speeding. The commission also required O'Neal to keep the street clean in the area. Homeowners had complained of thick dirt along the roadway leading to the dump site.

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CERTIFICATE OF SERVICE

I, Lisa Balzer, a secretary in the law firm of Vinson & Elkins L.L.P., do hereby certify that on this 5th day of August, 2003, I caused a copy of the foregoing "Comments" to be sent via first-class mail, postage prepaid, or hand-delivered, to:

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